No. 209.
JAN 3 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United State

Brief of Winn & Southard for C. 5, 6.

Frank M. Rider, John F. Burgess and Samuel M. Rutledg
as County Commissioners of Muskingum Coun
Ohio,

Plaintiffs in Erro

Filed Jan. 3, 1899.

versus

The United States of America,

Defendant in Erro

BRIEF FOR PLAINTIFFS IN ERROR.

SIMEON M. WINN and
FRANK H. SOUTHARD,
Solicitors for Plaintiffs in Er

ZANESVILLE:
GEORGE LILIENTHAL, PRINTER.
1898.

SUPREME COURT OF THE UNITED STATES.

FRANK M. RIDER, JOHN F. BURGESS and SAMUEL M. RUTLEDGE, County Commissioners of Muskingum County, Ohio,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

At Law October Term, 1898.

Statement.

This cause comes into this Court upon the allowance of a writ of error from the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

The plaintiffs in error were prosecuted and convicted in the Court below under a criminal information based upon the fourth and fifth sections of the River and Harbor Act approved September 19, 1890. Said sections four and five of the River and Harbor Act are clothed in the words and figures following to-wit:

> "Sec. 4. That section nine of the River and Harbor Act of August 11, 1888, be amended and re-enacted so as to read as follows: That whenever the Secretary of War shall have

good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening of the draw span of such bridge by rafts, steam boats or other water crafts, it shall be the duty of said secretary, first giving the parties reasonable opportunities to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken."

"Sec. 5. That section ten of the River and Harbor Act of August 11, 1888, be amended and re-enacted so as to read as follows: That if the persons, corporations or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required, from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5000.00 and every month such

person, corporation or association shall remain in default in respect to the removal or alteration of such bridge, shall be deemed a new offense and subject the person, corporation or association so offending to the penalties above described."

"Said criminal information so founded upon said sections four and five (omitting formal parts thereof) is clothed in the words and figures following, to wit: "Upon the 15th day of October, 1891, the defendants, Frank M. Rider, John F. Burgess and Samuel F. Rutledge, were then and there the county commissioners in Muskingum County, in the State of Ohio, and then and there the persons empowered by the law of Ohio to construct. alter and keep in repair all necessary bridges over streams and public canals on all state and county roads, and then and there the persons as county commissioners controlling the bridge across the Muskingum river between Taylorsville and Duncans Falls, Muskingum County, Ohio, and the Secretary of War of the United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum river. one of the navigable streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners, as aforesaid, setting forth in substance that said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio; and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, Tuesday, the 6th day of January, 1891, was set and named as the day when such evidence would

be heard before Lieut. Col. William E. Merrill, Corps Engineer, at U. S. Engineer's Office in Zanesville, Ohio, and which said day of hearing at the request of defendants was extended to the 3rd day February, 1891, and afterwards, to-wit: on the 25th day of February, 1891, and after said day of hearing the Secretary of War gave notice in writing to said defendants controlling said bridge, as aforesaid that the said bridge was and is an unreasonable obstruction to the free navigation of said river, one of the navigable waters of the United States, on account of not being provided with a draw span below the new United States lock No. 9, in said river, and requiring the following change to be made, to-wit: the construction of a draw span in said bridge below the said lock, in accordance with the plans shown on a map attached to said notice and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to-wit, on or before the 30th day of September, 1891, and that service of said notice as aforesaid, was made on the 3rd day of March, 1891, by delivering personally a copy thereof to said commissioners at their office in Zanesville, Ohio.

"And the said Frank M. Rider, John F. Burgess and Samuel M. Rutledge, County Commissioners of Muskingum County, Ohio, as aforesaid, did unlawfully, on, to-wit, the 15th day of October. 1891, at the place aforesaid and after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully failed and refused to comply with the said order of the Secretary of War and to make the alterations set forth in said notice, contrary to the form of sections four and five of an Act of Congress approved September 18, 1890."

Said cause was tried to a jury upon the evidence on December 11, 1891, and a pro forma verdict of guilty was taken. by consent, with the understanding that the questions of law involved should be presented and considered on motion for new trial. Thereupon, and on the 10th day of November, 1892, this cause was brought into this Court on a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio, and at the October term, 1895, the cause was heard before this Court on the transcript of record, and this Court refusing to answer the questions so certified, the certificate was by order of this Court, dismissed and the mandate of this Court certified back to the Circuit Court. Record pages 55 and 56.

And thereafter and on the 1st day of June, 1897, the motion for a new trial was heard and overruled by the Circuit Court, and the plaintiffs in error were sentenced to pay $10.00 each and costs of prosecution, to which finding, judgment and sentence the plaintiffs in error jointly and severally excepted, and filed their bill of exceptions, which was duly allowed, signed and sealed and made part of the record herein. Record pages 56 and 57.

Thereafter plaintiffs in error filed their petition for writ of error and assignment of errors, praying that a writ of error issue for the correction of errors complained of. Record pages 57 and 58.

On behalf of plaintiffs in error two questions only are urged for the consideration of the Court.

1st. Did the Secretary of War give to the plaintiffs in error reasonable notice and prescribe a reasonable time as provided in said section four of the River and Harbor Act?

2nd. Are the powers attempted to be delegated to the Secretary of War by sections four and five of the Act of Congress referred to exclusively lodged by the constitution in Congress; or can Congress confer those powers upon another by delegation; in other words, can Congress delegate to the Secretary of War the power to determine whether a bridge lawfully constructed over one of the navigable waterways of the United States is an obstruction to the free navigation of such waters, and such an obstruction to navigation that public interests require it to be removed or remodelled; or do these questions belong to Congress to determine, and which cannot be lawfully delegated to any subordinate authority or person?

The fifth and sixth assignments of error asserted and intended to be urged are embraced within said first question. The first, second, third and fourth assignments of error asserted and intended to be urged are embraced within said second question.

Preliminary to the consideration of these questions we submit the following brief statement of uncontested facts which appear on record, viz: The Muskingum river is situated wholly within the State of Ohio. The river is not navigable in its natural state except at times of high water, but was made so by the State of Ohio as early as 1840 by means of a system of dams, locks and side cut canals. At the point on said river where the offending bridge is situated the Muskingum river descends into rapids. At the head of these rapids under legislative grant from the State of Ohio a dam was constructed about the year 1838 across the main channel of said river entirely obstructing navigation thereon, and by like authority locks were built and a side

cut canal was constructed southward to the river below said rapids.

Since 1838 said dam and canal have been under the control of the State of Ohio through its Board of Public Works and through and by means of which canal, together with other dams and canals, slack water navigation was maintained on said river up until the cession of said river and its improvements by the State of Ohio to the Federal Government, March 21, 1887. As early as 1874 the Board of Commissioners of Muskingum County, under and by virtue of a grant from the State of Ohio, by legislative act passed March 25th, 1870, located and constructed in accordance with said act, the bridge herein complained of across the river immediately below said dam, thereby connecting the town of Duncans Falls with the town of Taylorsville which lie upon opposite sides of said river.

The navigation of said river while under the control of the State of Ohio through its Board of Public Works was carried on at said point through said side cut canal, and said canal was kept open and free from obstruction, public travel over said bridge being acommodated by a draw bridge over said side cut canal authorized and constructed by the commissioners of said county by authority of the said Board of Public Works under an act of the legislature of said state and in accordance with plans and specifications approved by said board, said commissioners providing a tender for said draw bridge to open and close said draw to admit the passage of all boats navigating said river, which condition continuously obtained prior to the cession of said river and its improvements to the National Government and continued down to the institution

of criminal proceedings herein. After the cession of said river and its improvements by the State of Ohio to the General Government and during the years 1890 and 1891, with a view of abandoning said side cut canal as a means of navigation on said river, the U. S. Government caused to be constructed in said dam at the head of said rapids what is known as Lock No. 9 where none theretofore existed and constructed from said locks down said river under said bridge and through said rapids, an artificial canal outside of the main channel of said river, and raised the locks and dam on the river below thus raising the water on the level above and sought to provide a new means for navigation at that point.

The Muskingum river with its improvements, was ceded by the State of Ohio to the government of the United States on the 2nd day of May, 1885, and such cession was accepted by the government by act of Congress approved on the 5th day of August, 1886, and the State of Ohio by act of March 21, 1887, made an appropriation for the purpose of completing the transfer of the Muskingum river improvements and properties to the United States, and afterwards, and before the criminal proceedings herein were begun, consumated the transfer of such river and its improvements from the State of Ohio by deed of conveyance to the United States.

With such conditions obtaining, the Secretary of War, on the 25th day of February, 1891, served upon the plaintiffs in error a notice clothed in the words and figures following:

WAR DEPARTMENT.
WASHINGTON CITY, Feb. 25, 1891.

"To the County Commissioners of Muskingum

County, Ohio:

"Take notice that;

Whereas, the Secretary of War has good reason to believe that the bridge owned and controlled by Muskingum County, Ohio, across the Muskingum river between Taylorsville and Duncans Falls is an unreasonable obstruction to the free navigation of said river (which is one of the navigable waters of the United States), on account of not being provided with a draw span below the new United States lock No. 9 in said river; and

"Whereas, the following alteration will render navigation through it reasonably, free, easy and unobstructed, to wit, the construction of a draw span in said bridge below the said lock in accordance with the span shown on the map hereto attached and,

"Whereas, to the 30th day of September, 1891, is a reasonable time in which to alter the said bridge as described above:"

"Now, therefore, in obedience to and by virtue of the fourth and fifth sections of an act of the congress of the United States entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19th, 1890. Redfield Proctor, Secretary of war, does hereby notify said County Commissioners of Muskingum County, Ohio, to alter the said bridge as described above, and prescribe that said alteration shall be made and completed on or before the 30th day of September, 1891.

L. A. GRANT,
Assistant Secretary of War."

(Record, page 50.)

Coming now to the consideration of the first proposition and while considering same, (assuming that the Secretary of War might lawfully possess and exercise the power to require the owners of a bridge over a navigable waterway to remove, change or alter the construction thereof as provided in said sections four and five under consideration,) did the Secretary of War give to the plaintiffs in error reasonable notice and prescribe a reasonable time in which to complete the work required to be done?

It clearly appears from the language of Section five that what is to be deemed reasonable notice or time within which to make the changes required is, and of necessity must be, governed and controlled by the facts and circumstances of each particular case in which the power of the government is invoked.

Section four of the act provides in terms that the Secretary of War shall prescribe in *each case* a reasonable time. The notice in this case was directed to the official board of the County Commissioners of Muskingum County, Ohio, having in charge and under control the construction, alteration and repair of all necessary bridges over streams on all state and county roads, within their county, including the bridge in question, and whatever was required by the notice was a duty imposed upon the official board and not upon the individual members constituting the board. The powers of this official board were all pointed out and prescribed by the statutes of the state and the board could not lawfully raise any money or appropriate the same when raised for the construction, alteration or repair of the bridge in question, except in the manner auth-

orized by the laws of the state. A time sufficient, therefore, must have been given in the notice to enable the Board of Commissioners to carry out its mandates, and in order to raise the money necessary to make the changes required by the notice under consideration regard must have been had by the Board of Commissioners to the laws of the state under and by virtue of which alone they were authorized and empowered to act. The Secretary of War was bound to take notice of the powers of the Board of County Commissioners and the laws governing and controlling its official acts when he served the notice, and so knowing, was bound to prescribe therein a reasonable time for their compliance with the demands thereof. But whether the Secretary of War actually knew or whether he was bound to know these things would not change the rule as to the requirement of reasonable notice under the facts that surrounded the Board of Commissioners at the time of the service of the notice. The notice was served by the Secretary of War on February 25th, 1891, and the limitation expired on September 30th, of the same year. (Record page 50.)

When this notice was served upon the Board of Commissioners there were no funds in the county treasury available for the purpose indicated, and no funds could be raised by the board through levy or taxation within the limitation prescribed in the notice and no general or special legislation could be had that would have empowered the board to meet the demands of the secretary as the record shows; in other words, the Secretary of War prescribed a time within which the Board of Commissioners, however desirous could not have performed the

requirements of the demand, because they were without public funds, and within the period prescribed could not have raised them in any manner known to the laws of their state. A notice that requires the performance of impossible acts cannot, we submit, be held to be reasonable notice or of any binding force or effect.

Under section five of the act it will be seen that it is the "*wilful failure* or *refusal*" of the person to remove the obstruction. Regard must be had to the character of the statute to be enforced. The sections of the act under consideration are penal in their nature and before a citizen can be punished for a failure to perform their requirements it must be made to appear that he had the opportunity and ability to perform them. No citizen can be put in default and criminally punished for a failure to do the *impossible*. As hereinbefore stated it appears from the evidence that when the notice was served by the Secretary of War upon the Board of Commissioners there were no funds in the county treasury with which to make the required change.

(Testimony of John F. Burgess, one of the plaintiffs in error, record, page 30.)

> Q. Can you state when the notice was served upon your board by the government to remove the obstruction claimed to be caused by the bridge at Taylorsvills?
>
> A. I cannot just give the date. It was sometime in March.
>
> Q. You were a member of the board at that time?
>
> A. Yes sir.
>
> Q. You may state whether there were any funds in the treasury of the county available for the making of the improvement or changes required by the government?

A. At that time there was no fund could be applied; no sir.

Q. Were there no funds that could have been made available except by legislation?

A. I think not.

Q. Have you any doubt?

A. No, there was none.

Is also appears from the record that the Board of Commissioners could only make levies for bridge purposes at their March and June sessions in each year, one-half of the amount so levied would not be collectible before December 20th of the same year and the remaining portion not before the 20th of June of the year following.

See Sec. 2824 Revised Statutes of Ohio, which provides as follows:

> "The Commissioners at their March or June session annually may levy on each dollar of valuation of taxable property within their county for road and bridge purposes."******

The taxes so levied by the Commissioners for road and bridge purposes are collectible in December following such levy, or, one-half in December and the balance in June of the following year. See Sec. 1091 Revised Statutes of Ohio, as follows:

> "Each person charged with taxes on a tax duplicate in the hands of a County Treasurer may pay the full amount of such taxes on or before the 20th day of December, or one-half thereof on or before the 20th day of December, and the remaining half thereof on or before the 20th day of June next ensuing."****

It also appears from the evidence that the cost of the changes required to be made by the notice exceeded $10,000 and that the Board of Commission-

ers could only meet that requirement and raise the required funds by the aid of a special act of the state legislature, and that the Board of Commissioners sought to secure such legislation but failed in their effort.

(Testimony of John F. Burgess, record, pages 30 and 31.)

Q. Are you able to state approximately the cost of this change required by the government in this bridge?

A. The probable cost, I should think, would be in the neighborhood of $30,000.

Q. What was the earliest date under any levy that your Board could make—what was the earliest date in which funds could be realized for bridge purposes—say at the date of the services of the notice in March?

A. There could not have been any made for that purpose without a special act of the legislature.

Q. Upon this point did you take any steps at any time to raise money for this purpose?

A. I think it was done.

Q. Well?

A. Our members of the legislature were talked to in that matter.

Q. Did you get any authority?

A, It was too late, too near the end of the session, and nothing could be done.

Q. When was that?

A. The last of March.

Q. And that was the only move?

A. Yes sir.

Q. Had your Board control of a fund for the building of bridges?

A. Not that kind of a bridge.

Q. You have a bridge fund?

A. Yes sir; we have a bridge fund.

Q. A general bridge fund?

A. Yes sir; but we hadn't any at that time.

(Also testimony of Lieut. C. E. Gillette, Corps of Engineers. Record, page 33.)

Q. Then in your estimate, Lieut., have you taken into account the expense of cofferdams?

A. No.

Q. In making this estimate you have not had in mind the plan of bridge and superstructure required by the general government of the Board of Commissioners, have you?

A. I have had in view the plans as drawn on the blue print.

Q. You have given your estimate based upon what the government, as you understand it, is requiring of the Board of Commissioners?

A. Yes sir; the government did not require any particular kind of bridge.

Q. You are putting an estimate upon some structure as good as the one already there?

A. Yes sir.

Q. And not upon what a new structure built according to modern engineering would cost?

A. I would say as good as the kind put in at Brush Creek recently; it is a much shorter span.

Q. That you think would be about ten or twelve thousand dollars?

A. Yes sir; a very rough estimate.

(See also Sec. 2825 Revised Statutes of Ohio, as follows:

"The County Commissioners shall not levy any tax or appropriate any money for the purpose of****building any bridge except in case of casualty the expense of which will ex-

> ceed ten thousand dollars without first submitting to the voters of the county the question of the policy****if at any such election a majority shall be found in favor of the improvements as aforesaid, then the Commissioners shall be authorized to proceed to levy the tax."

The exception in case of casualty found in the last named section has reference to the preceding section No. 2824, Revised Statute, which is clothed in the language following:

> "Provided further that in case an important bridge belonging to or maintained by any county has been or shall be destroyed or become dangerous to public travel by decay or otherwise, and the restoration thereof is deemed necessary for public accommodation, the Commissioners may levy a special tax for that purpose."****

It will be seen that the matter under consideration is not a casualty to which the statutes just quoted have reference.

Three matters, therefore, were established and uncontroverted at the trial of the cause in the Court below.

First: That the Board of County Commissioners had no funds available with which to make the changes provided for in the notice.

Second: That they could not have realized any money by levy within the limitations of the notice, because they could not have levied any tax for bridge purposes before March, and none of the taxes so levied in March could have been made available until December 20th of the same year which was after the limitation fixed in the notice.

Third. That they could not secure the funds necessary by special legislation. The failure of the legislature to pass the necessary legislation to enable the Board of Commissioners to raise the required funds could not put the Board in default. The Board of Commissioners could not, therefore, within the period of the notice have complied with its demands. It will not be urged, we apprehend, that this notice cast any obligations upon the plaintiffs in error as individuals. It would be manifestly unreasonable to assume that they were called upon to expend their own private funds in the performance of duties prescribed in the notice or to raise the necessary funds in any other way than the way provided and allowed by the statutes of the State. It is not the meaning or intention of this act to punish them for their refusal to commit malfeasance in office. In view of the position and conditions that surrounded the Board of Commissioners pointed out and clearly established upon the trial of the cause below by the undisputed evidence, the Court should have granted the motion for new trial and set aside the verdict of guilty. What is reasonable notice or reasonable time is always a question exclusively for the Court where the facts are clear. It was so held in Wiggins vs. Burkham, 10 Wallace 132, and Tolan vs. Sprague, 12 Peters 336.

For the reasons urged, we submit that the verdict is against the law and the evidence. and the Court, by refusing to grant the motion and set the verdict aside, committed manifest error to the predjudice of these plaintiffs in error.

We come now to the consideration of the second proposition which we regard the vital question and the one that goes to the root of the matter is," Has Con-

gress the power to confer upon the Secretary of War the authority sought to be conferred by this act?" In accordance with its terms when the Secretary of War has good reason to believe that any bridge spanning any of the navigable waterways of the United States is an unreasonable obstruction to navigation he is to give notice to the parties owning or controlling the same after first giving them an opportunity to be heard, to make such alterations as he shall specify, and if they fail or refuse to comply with his order, within a reasonable time, they are to be deemed guilty of a misdemeanor, and the Secretary of War may direct the institution of criminal proceedings. The power of the Secretary depends upon his first finding, and having adjudged that the bridge is an unreasonable obstruction to navigation and his adjudication is made final, there being no provision for a review of his findings. Is not this judicial power? We answer in the affirmative. The question is certainly one of fact, or a mixed question of law and fact, and cannot be determined by a court without the aid of a jury unless the defendants consent. There seems to be no question but that Congress can authorize the erection of a bridge across any of the navigable waterways of the United States upon such plans as may be adopted by the Secretary of War, as was held in case of Miller vs. Mayer &c (109 U. S. p. 385), but the adoption of plans by the Secretary is not a judicial act, nor does the authority to approve or adopt plans for the erection of a bridge confer on him judicial power. Is the Secretary of War such an officer of the general government, in whom, under the constitution, judicial power can be vested? We think not. It was held in Grant vs. Raymond

6 Pet. 242. Chief Justice Marshall delivered the opinion that the Secretary of State is not an officer in whom under the constitution judicial power can be vested. If the Secretary of State is not such an officer why the Secretary of War? In Grant vs. Raymond, the Secretary of State had gone through the form of reissuing a patent for an invention. It is true at that time there was no statute authorizing a reissue. The same having been signed by the President and countersigned by the Secretary it was returned to the patent office and cancelled owing to defective specification on which the original was issued, and a new patent issued with a corrected specification. The argument there in favor of the reissue was that the Department of State clearly had the right to correct an inadvertent or innocent mistake, but the Court said that the question of inadvertence or mistake, was a judicial question which could not be decided by the Secretary of State. It is also true that since that time Congress enacted laws which made it lawful for the Secretary of State and subsequently conferred authority on the Commissioner of Patents, to reissue patents for similar reasons, but provided that the reissued patent should be liable to the same defenses as the original. But there is a radical difference between the case of a reissued patent and the case now before this Court. The patent original or reissued, is only *prima facie* evidence of an exclusive right in the patentee, and is open to all defenses, including are issued patent, the question whether in the original there was such accident, mistake and inadvertence, as was requisite to the reissue, while here the Secretary of War finds and decides conclusively and finally whether the bridge is an obstruction. What

changes shall be made and within what time; and the only question left open to be heard upon the criminal information for misdemeanor filed at his instance and after he has finally determined all the questions of fact, are whether he had made the findings and decision, ordered the changes, given the proper notices, and whether the defendants have complied with his orders.

Having, as we think, conclusively shown that the power sought to be conferred by Congress is one that is judicial and that the only question which is left to be decided by a jury in the case of a criminal prosecution is whether or not the Secretary of War has declared a bridge to be an unreasonable obstruction. We then come to the question of the charge of the Court which is found on page 34 of the record, which is as follows: "And thereupon the Court charged the jury and among other things charged that Congress had the constitutional power to confer upon the Secretary of War authority to determine when a bridge such as the bridge in question is an unreasonable obstruction to the free navigation of a river and that the failure to comply by persons owning and controlling any such bridge as by the defendants in this case, if they so found, with such a determination by the Secretary of War after due notice and otherwise full compliance with the Act of Congress in that behalf lawfully subjected thereto by prosecution for a misdemeanor as provided by Act of Congress, to all of which parts of said charge defendants at the time then and there excepted."

In this, we think, the trial Court erred and the trial Court having instructed the jury that Congress had the power and constitutional right to confer

upon the Secretary of War the right to determine what was an unreasonable obstruction, nothing was left for the jury to do but to find the defendants guilty.

By the constitution of the United States, Congress has the paramount and conclusive authority in the regulation of the commercial highways of the country, if Congress shall undertake to confer that power upon the Secretary of War in so doing it must abdicate its paramount and conclusive authority and control over commercial highways. If Congress has that power, then Congress may declare a bridge a lawful structure, may declare its height, width of spans and the manner of its construction, and say that it is a legal structure, then the Secretary of War may be of the opinion that such a structure is not what he thinks it should be and in his opinion it is an obstruction to navigation. Who is to speak? Is it Congress, or is it the Secretary of War? It is probable that no bridge constructed across any of the navigable waterways of the United States is not some obstruction to the free navigation thereof. Sec. four of the act under which the Secretary of War claims to act requires the Secretary in case he has good reason to believe that a bridge is an unreasonable obstruction to the free navigation of a river by reason of insufficient height, width of span or otherwise, or where there is difficulty in passing the draw opening or raft span of the bridge, to give notice to the parties owning and controlling the same that they may have a hearing as to whether they shall comply with this order requiring such changes and alterations as in his opinion shall be proper.

This section must be construed literally, and if

so, it would compel the Secretary of War to require the alteration or possible removal of nearly every bridge in the country that spans a navigable river, and the only escape from this conclusion is to hold that it is intended to only require the alteration of bridges that cause an unreasonable obstruction to navigation or create an unreasonable difficulty in passing the draw spans thereof, and that the Secretary of War must determine in each case whether the bridge is or is not an unreasonable obstruction before he can require it to be altered. Therefore, we are forced back to the conclusion that the section in question confers upon the Secretary of War the duty of determining whether the given bridge in an unreasonable obstruction before the serving of any notices which in turn must involve the duty by the Secretary of War of determining how much of an obstruction the public interests require should be placed in the way of free navigation of the river which we maintain is a question which belongs alone to Congress to determine and which cannot be rightfully delegated to any subordinate authority or person. It certainly cannot be claimed that Congress could delegate the power to the Secretary of War to determine where and what bridges should be constructed across the navigable waters of the United States and if Congress cannot confer that authority upon the Secretary of War, how can it confer upon the Secretary of War the power and the right to determine what is an unreasonable obstruction to the navigation thereof. In each case the Secretary of War would be required to determine to what extent the free navigation of a river might be obstructed in the public interest and in one case to require the bridge to be built and in the other to be

remodeled or altered so as not to cause an obstruction greater than that which the Secretary had determined the navigation of the given river should be subject to and thus the judgment and decision of the Secretary upon the question of the amount of obstruction that the public interest demands should be caused to the otherwise free navigation of the river would be substituted to the judgment and decision of Congress upon this question. Hence, to suppose a case it would be in effect if a bridge owned by any person, company or corporation should be constructed in accordance with the requirements of an Act of Congress authorizing its erection, the case is then presented in this form. Congress declared that the navigation of the stream over which it authorized the construction of such a bridge should be subjected to so much of an obstruction as would be caused thereto by the erection of the bridge at the place and in the form provided in the act authorizing the construction of the same and the bridge having thus been built in conformity to the Act of Congress, then if afterwards the Secretary of War should be of the opinion and should deem the bridge to be an obstruction, then it must be remodeled or removed, or to state it otherwise, a bridge which Congress authorized and declared to be a legal structure can be declared to be illegal and therefore removable by the Secretary of War, and in effect a structure which was a legalized obstruction to the navigation of a river is declared to be an obstruction by the Secretary of War and for that reason the bridge must be removed or rebuilt in whole or in part as the Secretary of War might determine. Then it must be held if this is true that the section of the Act of Congress hereinbefore referred to was

not intended to be applied to such cases, or if it was then the section is void for the reason that Congress cannot confer the power upon the Secretary of War of determining questions which Congress alone can decide, nor can the Secretary be empowered to determine when an Act of Congress anthorizing and legalizing the erection and maintenance of a bridge over a navigable river shall cease to have that effect and thus declare a bridge to be an illegal obstruction to navigation which Congress has declared is a legal obstruction. If this be true, then the paramount and conclusive authority as to the regulation of the navigation of the navigable rivers and waterways of the United States is abdicated and the constitution conferring upon Congress that power is of no effect. We do not contend but that Congress may, whenever it sees fit, by any specific act, pass a law authorizing the construction of a bridge and to say how much obstruction to navigation the river over which it is authorized to be constructed shall endure, nor do we contend that Congress may not in its discretion, even though it may have authorized the erection of a bridge across a river afterwards withdraw that authority and say that the bridge may be removed as in this case the bridge having been constructed over the Muskingum river before Congress assumed control or management of the same during the time the river was under the control of the State, having been approved by the Board of Public Works of the State of Ohio, yet Congress may, by specific act declare the bridge in question an unreasonable obstruction to navigation and order such changes or removal as Congress may desire. And it may also by act, as referred to in Wheeling vs.

Bridge Co. hereinbefore mentioned take a bridge that was constructed without authority and declare it legal but Congress cannot confer such authority upon the Secretary of War.

The construction of sections nine and ten of the Act of 1888 as amended by sections four and five of the River and Harbor Act Sept. 13, 1891, have been before the Courts of the United States first in the case of the United States vs. Keokuk and H. Bridge Co. reported in 45th Federal at page 178 and again reported in 50th. Federal Reporter in the case of the United States vs, Rider, et. al., County Commissioners at page 106 which we here cite and claim that each of said cases and the reasoning thereof is applicable to this case and that they are authority to support the proposition as to the power of Congress to confer upon the Secretary of War the right to determine what is an unreasonable obstruction and to sustain us in the claim that Congress under the constitution has no such power, and we refer the Court to the cases above mentioned and to the reasoning of the Courts in deciding it.

Hence, in conclusion we say that the notices served upon the Commissioners of Muskingum county by the Secretary of War were void and of no effect and that the trial and conviction of the plaintiffs in error is also void and of no effect and should be reversed and set aside and that the Court erred in charging the jury that Congress had the power to confer upon the Secretary of War the authority attempted to be conferred by the act hereinbefore mentioned, and for the reasons stated that the judgment of the Court below in passing sentence upon these defendants should be set aside and that

the act referred to should be held to be unconstitutional and that plaintiffs in error should be permitted to go hence without day.

Respectfully Submitted,

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